



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR parts 213, 229, 232, and 252

[Docket DARS-2022-0014]

RIN 0750-AL51

Defense Federal Acquisition Regulation Supplement: Reporting Tax Information on Certain Foreign Procurements (DFARS Case 2021-D029)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to allow for the efficient and accurate identification of contracts subject to excise tax withholding. DoD is also proposing to prohibit use of the Governmentwide commercial purchase card as a method of payment when the tax on certain foreign procurements applies. These changes will promote the efficient administration of the excise tax.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2021-D029, using any of the following methods:

o *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for "DFARS Case 2021-D029" in the search box and select "Search." Select "Comment" and follow the instructions to submit a comment. Please include your name, company name (if any), and "DFARS Case 2021-D029" on any attached document.

o *Email:* osd.dfars@mail.mil. Include DFARS Case 2021-D029 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: David E. Johnson, telephone 202-913-5764.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to allow for the accurate identification of contracts subject to excise tax withholding, as well as the proper identification of those contracts for which the contractor claimed a full exemption from the tax. Section 301 of the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111-347), codified at 26 U.S.C. 5000C, imposes a two-percent excise tax on specified Federal procurement payments to certain foreign persons; it does not apply to payments to United States persons. With certain exceptions, to administer this tax DoD must withhold an amount

equal to two percent of the amount of specified Federal procurement payments.

Federal Acquisition Regulation (FAR) solicitation provision 52.229-11, Tax on Certain Foreign Procurements—Notice and Representation, provides offerors an opportunity to claim a full exemption from the tax at the time of their offer. The proposed DFARS contract clause 252.229-70XX, Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements, is needed because presently no guidance, requirement, or mechanism exists to document an offeror's claim of full exemption from the tax.

Currently, the contract clause at FAR 52.229-12, Tax on Certain Foreign Procurements, requires the DoD payment office to withhold the two-percent excise tax if the contractor does not submit an Internal Revenue Service (IRS) Form W-14, Certificate of Foreign Contracting Party Receiving Federal Procurement Payments, with each invoice. However, if the contractor claimed a full exemption at the time of its offer, then the contractor is not required to submit IRS Form W-14 with each invoice. Accordingly, the DoD payment systems and networks may erroneously withhold the tax if the contractor's full exemption that was claimed at the time of its offer is not documented in the contract. Inclusion of the proposed clause at DFARS 252.229-70XX will ensure the DoD payment office and other DoD organizations are aware of contractors claiming a full exemption at the time of contract award.

DoD is also proposing to prohibit use of the Governmentwide commercial purchase card (GCPC) as a method of payment on contracts subject to the two-percent excise tax. When the GCPC is used as a method of payment, a third party, i.e., the bank that issued the GCPC, and not the DoD payment office, processes the payment to the contractor. In this situation, the Government lacks a mechanism to withhold the tax prior to the contractor being paid.

This proposed rule is intended to promote efficient administration of the two-percent excise tax. It does not impose a new requirement or burden on contractors or the public. Rather, this proposed rule likely benefits contractors by minimizing the likelihood of erroneous withholding of the two-percent excise tax.

II. Discussion and Analysis

This proposed rule applies to Federal Government contracts that include FAR clause 52.229-12, that are valued over \$250,000, and that are awarded to foreign persons for goods or services, if the goods are manufactured or produced or the services are provided in any country that is not a party to an international procurement agreement with the United States (see FAR 25.003 for the definitions of "World Trade Organization Government Procurement Agreement (WTO GPA) country" and "Free Trade Agreement country"). FAR 29.402-3(b) requires FAR clause 52.229-12 to be included in solicitations in which FAR provision

52.229-11 is included and in the resulting contract when the contractor represented that it is a foreign person.

Paragraph (d)(2) of FAR provision 52.229-11 allows the offeror to claim either a "full exemption" or a "partial or no exemption" from the excise tax. However, in accordance with FAR 29.402-3, FAR 52.229-12 will be included in the resulting contract where the offeror had indicated that it is a foreign person, regardless of whether the offeror may have claimed a full exemption as part of their offer.

The DoD finance and accounting systems utilize the presence of various FAR clauses in contracts to determine entitlement to payment, including required offsets and withholds. However, the presence or absence of FAR 52.229-12 in contracts does not in itself allow DoD payment systems or networks to determine whether withholding the two-percent excise tax is correct for a given contract or whether a contractor had claimed a full exemption in their initial offer.

The proposed clause at DFARS 252.229-70XX, by its inclusion in the contract, will provide for a simple and efficient method for contracting officers to alert the DoD payment systems and networks that a contractor claimed a full exemption in its offer, thereby preventing erroneous withholding of the two-percent excise tax. This clause would also complement FAR 52.229-12 in applicable contracts where FAR 52.229-12 requires contractors to notify contracting officers of a change in circumstances concerning the full exemption during the

performance of the contract, causing the contractor to be subject to the tax.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Services and Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items

This rule proposes to create a new DFARS clause 252.229-70XX, Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements, to implement section 301 of the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111-347), codified at 26 U.S.C. 5000C. The clause at DFARS 252.229-70XX is prescribed at DFARS 229.402-70(k) for use in contracts that include the clause at FAR 52.229-12, Tax on Certain Foreign Procurements, for which the contractor represented in its offer that it is a foreign person and is fully exempt from the tax for reasons cited on their IRS Form W-14. FAR 52.229-12 is used when FAR 52.229-11, Tax on Certain Foreign Procurements - Notice and Representation, is used; and FAR 52.229-11 does not apply to acquisitions that do not exceed the simplified acquisition threshold. Accordingly, DoD does not intend to apply the rule to acquisitions at or below the SAT but does intend to apply the rule to the acquisition of commercial services and commercial products, including COTS items.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations. DoD does not intend to make that determination. Therefore, this rule will not apply at or below the SAT.

B. Applicability to Contracts for the Acquisition of Commercial Services and Commercial Products Including COTS Items

10 U.S.C. 3452 (previously 10 U.S.C. 2375) exempts contracts and subcontracts for the acquisition of commercial products, including COTS items, and commercial services from provisions of law enacted after October 13, 1994, unless the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) makes a written determination that it would not be in the best interest of DoD to exempt contracts for the procurement of commercial products and commercial services from the applicability of the

provision or contract requirement, except for a provision of law that—

- Provides for criminal or civil penalties;
- Requires that certain articles be bought from American sources pursuant to 10 U.S.C. 4862 (previously 10 U.S.C. 2533c), or that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. 4863 (previously 10 U.S.C. 2533b); or
- Specifically refers to 10 U.S.C. 3452 and states that it shall apply to contracts and subcontracts for the acquisition of commercial products (including COTS items) and commercial services; or
- USD(A&S) determines in writing that it would not be in the best interest of the Government to exempt contracts or subcontracts for the acquisition of commercial products or commercial services from the applicability of the provision or contract clause requirement.

Section 301 of the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111-347), codified at 26 U.S.C. 5000C and implemented by this rule, does not impose criminal or civil penalties; does not require purchase pursuant to 10 U.S.C. 4862 or 4863; and does not refer to 10 U.S.C. 3452. Section 301 will not apply to the acquisition of commercial services or commercial products including COTS items unless a written determination is made. Due to delegations of authority from USD(A&S), the Principal Director, DPC, is the appropriate

authority to make the written determination. DoD intends to make that determination to apply this rule to the acquisition of commercial services and commercial products including COTS items, if otherwise applicable.

C. Determination

The proposed clause at 252.229-70XX is intended to provide a simple and efficient way for contracting officers to alert the DoD payment systems and networks that a contractor claimed a full exemption from the two-percent excise tax in its offer, thereby preventing erroneous withholding of the tax. Not applying the clause to contracts for the acquisition of commercial services and commercial products, including COTS items, would exclude contracts intended to be covered by this proposed rule and undermine the overarching purpose of the rule. Consequently, DoD plans to apply the proposed rule to contracts for the acquisition of commercial services and commercial products, including COTS items.

IV. Expected Impact of the Rule

This proposed rule will promote efficient administration of the two-percent excise tax. It imposes no new requirement or burden on contractors or the public. Rather, this proposed rule likely benefits contractors by minimizing the possibility of erroneous withholding of the two-percent excise tax. Additionally, the two-percent excise tax applies only to specified Federal procurement payments to certain foreign persons; it does not apply to payments to U.S. persons.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not anticipated to be a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within

the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not implement any requirements with which small entities must comply. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This proposed rule aids the administration of the two-percent excise tax on specified Federal procurement payments to certain foreign persons by prescribing inclusion of a new DFARS clause in contracts when the tax on certain foreign procurements applies and the contractor claimed a full exemption from the tax. Further, this proposed rule prohibits use of the Governmentwide commercial purchase card as a method of payment when the tax on certain foreign procurements applies and the contractor did not claim a full exemption.

The objective of this proposed rule is to promote efficient administration of the two-percent excise tax on specified Federal procurement payments to certain foreign persons. The legal basis for the rule is 41 U.S.C. 1303 and section 301 of the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111-347), codified at 26 U.S.C. 5000C.

The proposed rule applies to Federal Government contracts that include the clause at FAR 52.229-12, Tax on Certain Foreign Procurements; that are valued over \$250,000; and that are awarded to foreign persons for goods or services, if the goods are manufactured or produced or the services are provided in any country that is not a party to an international procurement

agreement with the United States (see FAR 25.003 for the definitions of "World Trade Organization Government Procurement Agreement (WTO GPA) country" and "Free Trade Agreement country"). Data for fiscal year 2021 was obtained from the Federal Procurement Data System for contract awards reflecting these criteria. There were 123 total contract awards; 117 were awarded to 56 unique large entities and 6 were awarded to 4 unique small entities for a total of 60 unique foreign entities. Accordingly, the proposed rule is not expected to have a significant impact on small entities based in the United States.

This rule imposes no reporting, recordkeeping, or other compliance requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known available alternatives to the proposed rule to accomplish the desired objective.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2021-D029), in correspondence.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies to this rule. However, these changes to the DFARS do not impose

additional information collection requirements to the paperwork burden previously approved under OMB Control Number 1545-2263, entitled Tax on Certain Foreign Procurement.

List of Subjects in 48 CFR parts 213, 229, 232, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 213, 229, 232, and 252 are proposed to be amended as follows:

1. The authority citation for parts 213, 229, 232, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 213—SIMPLIFIED ACQUISITION PROCEDURES

2. Amend section 213.301 by redesignating paragraph (4) as paragraph (5) and adding a new paragraph (4) to read as follows:

213.301 Governmentwide commercial purchase card.

* * * * *

(4) The contracting officer shall not authorize the Governmentwide commercial purchase card as a method of payment during any contract period of performance if the contract includes the clause at FAR 52.229-12, Tax on Certain Foreign Procurements, unless the contract also includes the clause at 252.229-70XX, Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements, indicating that the contractor is fully exempt from the tax.

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PART 229—TAXES

3. Add subpart 229.2, consisting of section 229.204, to read as follows:

SUBPART 229.2—FEDERAL EXCISE TAXES

229.204 Federal excise tax on specific foreign contract payments.

The contracting officer shall not authorize the Governmentwide commercial purchase card as a method of payment during any contract period of performance if the contract includes the clause at FAR 52.229-12, Tax on Certain Foreign Procurements, unless the contract also includes the clause at 252.229-70XX, Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements, indicating that the contractor is fully exempt from the tax.

4. Amend section 229.402-70 by adding paragraph (k) to read as follows:

229.402-70 Additional provisions and clauses.

* * * * *

(k) Use the clause at 252.229-70XX, Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements, in contracts that include the clause at FAR 52.229-12, Tax on Certain Foreign Procurements, when the contractor has—

(1) Represented that it is a foreign person in response to the provision at FAR 52.229-11, Tax on Certain Foreign Procurements—Notice and Representation; and

(2) Indicated that it is fully exempt from the tax for reasons cited on their IRS Form W-14, Certificate of Foreign Contracting Party Receiving Federal Procurement Payments.

PART 232—CONTRACT FINANCING

5. Add sections 232.1108 and 232.1108-70 to subpart 232.11 to read as follows:

232.1108 Payment by Governmentwide commercial purchase card.

232.1108-70 Prohibition of Governmentwide commercial purchase card as a method of payment when the tax on certain foreign procurements applies.

The contracting officer shall not authorize the Governmentwide commercial purchase card as a method of payment during any contract period of performance if the contract includes the clause at FAR 52.229-12, Tax on Certain Foreign Procurements, unless the contract also includes the clause at 252.229-70XX, Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements, indicating that the contractor is fully exempt from the tax.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Add section 252.229-70XX to read as follows:

252.229-70XX Full Exemption from Two-Percent Excise Tax on Certain Foreign Procurements.

As prescribed in 229.402-70(k), use the following clause:

FULL EXEMPTION FROM TWO-PERCENT EXCISE TAX ON CERTAIN FOREIGN PROCUREMENTS (DATE)

(a) As the Contractor represented in its offer, any item, including any item delivered under subcontract; any service; or any combination thereof delivered under this contract is fully exempt from the 2-percent excise tax withholding imposed by 26 U.S.C. 5000C and implemented by Federal Acquisition Regulation (FAR) 52.229-12, Tax on Certain Foreign Procurements.

(b) If the full exemption no longer applies due to a change in circumstances during the performance of the contract, causing the Contractor to become subject to the withholding for the 2-percent excise tax as imposed by 26 U.S.C. 5000C, then the Contractor shall immediately comply with the notification and billing requirements of FAR clause 52.229-12.

(End of clause)